

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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Petition of Qwest Corporation for Forbearance  
Pursuant to 47 U.S.C. § 160(c) in the Phoenix  
MSA

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**WC Docket No. 09-135**

**COMMENTS OF VERIZON**

Michael E. Glover  
*Of Counsel*

Edward Shakin  
Rashann R. Duvall  
**VERIZON**  
1320 N. Courthouse Rd.  
Arlington, VA 22201  
(703) 351-3179

*Attorneys for Verizon*

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**SUMMARY AND INTRODUCTION**

Unbundling is an extreme form of regulation designed to allow for market entry when competitors are otherwise impaired. Because of the degree of market dislocation and negative incentives associated with unbundling, the Commission and the courts have recognized that the application of unbundling should be strictly limited. In the context of this forbearance proceeding, the Commission has the opportunity to establish tests that recognize the changes in the marketplace, and in particular, the rapid growth of wireless and other intermodal alternatives. Only by looking at the full scope of competition will the Commission establish a test that actually measures where unbundling is truly needed.

There is no dispute that the communications marketplace is undergoing dramatic changes. Today, for mass market services, consumers use more minutes on wireless phones than landlines. In addition, traditional wireline competitors face widespread competition from intermodal competitors including cable and IP-based over-the-top Voice over Internet Protocol (“VoIP”) providers—providers that compete without unbundled network elements (“UNEs”). In

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<sup>1</sup> The Verizon companies participating in this filing (“Verizon”) are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

many areas ILECs have already lost half or more of their mass market lines to intermodal competitors. Even with the significant line loss that has already occurred, incumbent providers continue to lose lines to intermodal competitors at high single - or double-digit rates annually.

ILECs face similar widespread competition in the provision of communications services to businesses, including carrier customers. During the past several years, cable companies and other non-UNE based providers have made substantial investments in facilities for business services and have aggressively targeted business customers including wireless providers and other carrier customers. Even during the current recession, cable companies have continued to invest heavily in facilities used to provide business services and continue to experience significant revenue growth for their business services.<sup>2</sup> Despite this robust competition, ILECs are still subject to unnecessary, costly unbundling requirements in most of the country, placing ILECs at a significant competitive disadvantage.

To correct this situation, the analytical framework the Commission applies to Qwest's Petition should, consistent with the forbearance standard, remove unbundling obligations where competitors are not impaired. The Commission has already found that requiring unbundling when there is no impairment harms competition. Competition is the lynchpin of the statutory forbearance test. It would be contrary to the intent of the forbearance requirement to maintain an unbundling obligation despite a finding that such obligation undermines competition and investment. A focus on the impairment test is not inconsistent with the D.C. Circuit's recent decision in *Verizon Telephone Cos. v. FCC*, 570 F.3d 294 (D.C. Cir. 2009), where the Court

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<sup>2</sup> See, e.g., Alan Breznick, Heavy Lifting Analyst Notes, *Cable Sets Business Sights Higher*, (noting that between 2008 and 2009 "all five of the biggest MSOs in the U.S. have notched sizeable gains in commercial services revenue even as their overall growth revenue flattened out" and that "cable operators are still boosting their capital spending on plant and equipment upgrades for commercial customers, even as they're slashing their overall capital budgets." available at [http://www.heavyreading.com/document.asp?doc\\_id=185141](http://www.heavyreading.com/document.asp?doc_id=185141)).

merely held that the Commission need not use the impairment test in place of the forbearance standards. It did not rule on the question of whether, given the Commission and Court findings that unbundling with no impairment harms competition, the statutory provisions of the forbearance test are necessarily satisfied in the context of unbundling obligations when competitors are not impaired.

The Commission's analytical framework should also capture current marketplace conditions, and in particular the dynamic nature of the marketplace. Accordingly, the Commission's analytical framework should be forward-looking and should include both intermodal and intramodal competition as well as both potential and actual competition. In light of the need for a forward-looking analysis here, the Commission should, as it has in the past, reject calls to apply the Department of Justice ("DOJ") and Federal Trade Commission's (FTC) *Horizontal Merger Guidelines* ("Guidelines")<sup>3</sup>, which center primarily on traditional market share measures. Even the *Guidelines* recognize that backwards-looking market share-based measures may be of limited value in dynamic marketplaces, such as this, with new and emerging competitors and technologies.

There is abundant evidence, detailed below, that intermodal providers compete against wireline providers in all market segments and that intermodal competitors continue to expand the scope of their existing offerings to include new services and geographic areas. In recent years, numerous mass market and business customers have switched from ILECs and other traditional wireline providers to intermodal providers, confirming that both mass market and business customers regard intermodal services as alternatives to traditional wireline services. In light of

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<sup>3</sup> U.S. Department of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines*, § 0.1 (rev. ed. Apr. 8, 1997), available at <http://www.justice.gov/atr/public/guidelines/hmg.htm> ("Guidelines").

this evidence, there is no legitimate basis for excluding any type of intermodal competition, let alone all such competition from the Commission's competitive analysis. And, in the case of wireless phones, there is no legitimate basis for excluding any form of wireless competition. According to recent data, the wireless penetration rate has already reached 91 percent of the total U.S. population, and almost 40 percent of American households use a wireless phone as their primary or exclusive phone.<sup>4</sup> These data and other evidence described below confirm that the vast majority of Americans, including those who have not yet cut the cord, view wireless phones as a suitable alternative to traditional wireline service. Accordingly, it would not be credible to exclude any wireless competition from the Commission's analysis.

Regardless of the analytical framework the Commission applies to Qwest's Petition, the Commission should use this proceeding to establish a clear process using the impairment standard under which ILECs can obtain timely relief from unbundling requirements. The requirement to offer unbundled segments of their networks at TELRIC prices is an extreme form of regulation. As a result, the Commission should only require UNEs in those limited circumstances where competitors have no other viable option.

#### **I. The Commission Should Use a Flexible Analytical Framework That Is Tailored to the Unbundling Requirements and Impairment Standard**

There is extensive evidence that the communications marketplace is dynamic with many new and emerging competitors and technologies. Accordingly, the Commission should develop

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<sup>4</sup> See CTIA, *Wireless Quick Facts: Year End Figures* available at <http://www.ctia.org/advocacy/research/index.cfm/AID/10323> (last visited Apr. 20, 2009) ("CTIA, *Wireless Quick Facts*") (reporting a wireless penetration rate of 91%); Stephen Blumberg, and Julian V. Lake, Centers for Disease Control, *Wireless Substitution: Early Releases of Estimates From the National Health Interview Survey*, January - June 2009, at 1 (Rel. Dec. 16, 2009) available at <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless200912.htm> ("CDC Study") (22.7% of households with wireless only phones and 14.7% of households with a landline received all or almost all calls on a wireless phone).

a flexible, forward-looking analytical framework that is centered on whether UNEs continue to be necessary under Section 251 in the geographic area at issue, and not the market share of any given competitor. In developing its analytical framework, the Commission should follow the DOJ's guidance on assessing competitive conditions in dynamic marketplaces, which, as explained fully below, requires including both potential and actual competition from all competitors who offer or plan to offer services that compete with traditional wireline services, regardless of technology.

Despite the rapidly changing nature of this marketplace, some parties misguidedly suggest that the Commission should apply the *Guidelines* to Qwest's Petition. The Commission should reject these suggestions because the *Guidelines* were not developed to answer the matter at hand here—whether competition is possible without UNEs. Moreover, the *Guidelines* focus heavily on traditional market share-based measures, which have significant limitations in dynamic marketplaces such as this.

The *Guidelines* were created to provide an analytical framework for evaluating the competitive impact of a horizontal merger and focus on whether a horizontal merger “is likely substantially to lessen competition.”<sup>5</sup> The *Guidelines* explain that “[t]he unifying theme of the Guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise.”<sup>6</sup> Accordingly, the *Guidelines* rely heavily on traditional market share and market concentration measures. Even with this focus, the *Guidelines* recognize that traditional market share-based measures have significant limitations in dynamic marketplaces. Specifically,

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<sup>5</sup> *Guidelines* § 0.1.

<sup>6</sup> *Id.*

the *Guidelines* state that “market share and market concentration data may understate . . . the likely future competitive significance of a firm . . . in the market.”<sup>7</sup>

This situation is wholly distinct from the horizontal merger context. Therefore it would not be appropriate to apply the *Guidelines* to Qwest’s Petition. Unlike a horizontal merger, the focus here is on whether UNEs continue to be necessary under Section 251, and not whether the exercise of market power is possible. As the Commission has repeatedly recognized, the respective market shares of individual competitors and market concentration are not relevant to the UNE forbearance inquiry.<sup>8</sup> For this reason, the Commission has expressly rejected prior calls to apply the *Guidelines* in the unbundling context, finding that they “do[] not fit the purposes of the [1996] Act.”<sup>9</sup> The Commission should, therefore, reject similar calls to apply the *Guidelines* to Qwest’s Petition. However, as explained below, the *Guidelines* do provide helpful guidance on how the relevant product markets should be defined in dynamic marketplaces.

More fundamentally, the Commission should use this opportunity to eliminate unbundling if it finds that competitors are not impaired in providing competing services. The Commission and the Courts have recognized that mandating unbundling where carriers are not impaired harms competition.<sup>10</sup> This is because the TELRIC pricing of UNEs “create[s]

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<sup>7</sup> *Id.* § 1.52.

<sup>8</sup> See, e.g., Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 ¶ 109 (2003) (subsequent history omitted) (“*Triennial Review Order*” or “*TRO*”) (explaining that “[t]he purposes of a market power analysis are not the purposes of section 251(d)(2)” because the Act “requires only that network elements be unbundled if competing carriers are impaired”).

<sup>9</sup> *Id.* ¶ 111.

<sup>10</sup> See Memorandum Opinion and Order, *Fones4All Corp. Petition for Expedited Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 from Application of Rule 51.319(d) to Competitive Local Exchange Carriers Using Unbundled Local Switching to Provide Single Line Residential Service to End Users Eligible for State or Federal*

disincentives for incumbent LECs and competitive LECs to deploy innovative services and facilities.”<sup>11</sup>

The courts have likewise recognized that “unbundling is not an unqualified good,” but instead “comes at a cost, including disincentives to research and development by both ILECs and CLECs and the tangled management inherent in shared use of a common resource.”<sup>12</sup> Where there is “no reason to think [mandating unbundling] would bring on a significant enhancement of competition” — as here, where there is already extensive and growing competition for mass-market and enterprise customers from intermodal and non-UNE intramodal providers — “nothing in the Act appears a license to the Commission to inflict on the economy the sort of costs” associated with unbundling.<sup>13</sup> For these reasons, TELRIC pricing may only be applied “where impairment is found to exist.”<sup>14</sup>

Competition, moreover, is the lynchpin of the Section 10 analysis. The language of the forbearance statute expressly instructs the FCC to “promote” and “enhance” competition—which for the reasons explained above cannot be reconciled with maintaining unbundling where competitors are not impaired.<sup>15</sup> There is simply no way the Commission can legitimately find that the forbearance standard is not met when continuation of unbundling obligations would itself harm competition.

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*Lifeline Service*, 21 FCC Rcd 11125 ¶ 13 (2006) (subsequent history omitted) (recognizing that “consumers benefit most” when unbundling is eliminated); *see also EarthLink v. FCC*, 462 F.3d 1, 13 (D.C. Cir. 2006) (forced unbundling at *any* price is harmful to competition “due to the costs inherent in complying with any unbundling mandate.”); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (government regulation of the marketplace is “for the protection of *competition*, not *competitors*”) (internal quotation marks omitted).

<sup>11</sup> Order on Remand, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533, ¶ 36 (2004).

<sup>12</sup> *USTA I*, 290 F.3d at 429.

<sup>13</sup> *USTA I*, 290 F.3d at 429.

<sup>14</sup> *TRO* ¶ 656; *see also USTA II*, 359 F.3d at 589.

<sup>15</sup> 47 U.S.C. § 160(b).

Looking to the impairment standard in applying the statutory forbearance criteria is not inconsistent with the D.C. Circuit’s decision in *Verizon*, which did not consider the question whether, as a factual matter, the forbearance test itself dictates the elimination of unbundling where there is no impairment. Although the Court found that the Commission was not unreasonable in not applying the impairment standard directly, in place of the forbearance criteria, it did not take the next step and find that, where continuing to mandate unbundling harms competition because there is no impairment (or the costs of unbundling outweigh any benefits), the Commission could maintain existing forbearance requirements and deny a petition for forbearance from unbundling obligations. Indeed, the Court overturned the Commission’s denial of forbearance because the Commission failed to justify its reliance on market share, and ignored the impact of potential competition, a key component of the impairment analysis.<sup>16</sup>

## **II. The Commission’s Analytical Framework Should Include Both Intramodal and Intermodal Competition**

### **A. There is Extensive Evidence That Intermodal Providers Compete With ILECs for Mass Market and Business Customers**

Recent evidence, described fully below, confirms that intermodal providers continue to compete aggressively with ILECs for mass market and business customers, including carrier customers, without using UNEs. Excluding intermodal competition from the Commission’s competitive analysis would not withstand scrutiny given this evidence and prior Commission decisions in which the Commission included intermodal competition in its competitive analysis.

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<sup>16</sup> *USTA II*, 359 F.3d at 575 (holding that competitors are not impaired when “competition is possible” without UNEs).

The *Guidelines* provide further support for including both intramodal and intermodal competition. Specifically, the *Guidelines* explain that a proper competitive analysis should focus on the extent to which consumers view various services as substitutes, regardless of the technologies used to provide those services.<sup>17</sup> The *Guidelines* also explain that the touchstone for conducting a competitive analysis is “the functional experience from the perspective of the customer, not the particular technology used by the provider.”<sup>18</sup> The DOJ has further recognized that entry is more likely in the case of competitors, such as intermodal competitors which “can differentiate their products” and compete on available service features, where “enough consumers find the products sufficiently substitutable.”<sup>19</sup> Likewise, in the special access proceeding, economist Dr. Michael Topper has explained that to assess properly competition “the focus should be from the perspective of purchasers, and include all technologies that purchasers view as viable alternatives.”<sup>20</sup>

These comments focus on the extensive evidence demonstrating that intermodal competitors compete with ILECs and other traditional wireline providers because most of the debate on defining the relevant product market has centered on intermodal competition. However, ILECs also face extensive non-UNE based competition from traditional wireline

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<sup>17</sup> *Guidelines* §§ 1.0; 1.11.

<sup>18</sup> Comments of the Department of Justice, *Economic Issues in Broadband Competition a National Broadband Plan for Our Future*, GN Docket No. 09-51, at 12 (filed Jan. 4, 2010) (“*DOJ Comments*”).

<sup>19</sup> See, e.g., U.S. Dep’t of Justice, *Voice, Video and Broadband: The Changing Competitive Landscape and Its Impact on Consumers* at 34 (Nov. 2008) (“*November 2008 DOJ Study*”), available at <http://www.usdoj.gov/atr/public/reports/239284.pdf>.

<sup>20</sup> Declaration of Michael D. Topper ¶ 26, Attachment A to Comments of Verizon and Verizon Wireless, WC Docket No. 05-25, RM 10593 (filed Jan. 19, 2010) (“*Topper Declaration*”).

providers in the mass market and enterprise segments. Verizon's comments<sup>21</sup> on the remand of the *Verizon Six MSA Order*<sup>22</sup> describe this additional intramodal competition.

For purposes of analyzing intermodal competition, the Commission should include all competitive alternatives that consumers view as suitable alternatives to traditional ILEC services, regardless of the technologies used to provide those services, and regardless of whether those services are identical to traditional ILEC services.

# 1. Wireless

In the *Verizon Six MSA Order*, *Qwest Four MSA Order* and *272 Sunset Order* the Commission appropriately considered wireless competition in its competitive analyses based on substantial evidence that wireless phones compete with traditional wireline telephone service.<sup>23</sup> In those orders, the Commission took a "conservative" approach by counting only cut the cord

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<sup>21</sup> Comments of Verizon, *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas and Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, WC Docket Nos. 06-172, 07-97, at 8, 10-11 (filed Sept. 21, 2009).

<sup>22</sup> Memorandum Opinion and Order, *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas and Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, 22 FCC Rcd 21293 (2007) ("*Verizon Six MSA Order*").

<sup>23</sup> Memorandum Order and Opinion, *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, 23 FCC Rcd 11729, ¶ 19 (2008) ("*Qwest Four MSA Order*") ("We find that mobile wireless service should be included in the local services product market to the extent that it is used as a complete substitute for all of a consumer's voice communications needs."; *Verizon Six MSA Order* at Appendix B; calculating market share for stand-alone long distance service "taking . . . wireline-wireless usage substitution into account," and relying on Yankee Group data for that analysis); Report and Order and Memorandum Opinion and Order, *Section 272 (f)(1) Sunset of the BOC Separate Affiliates and Related Requirements*, 22 FCC Rcd 16440 ¶ 42 (2007) ("*272 Sunset Order*") (calculating market shares for bundled local and long distance services that included cut-the-cord wireless.).

competition, thereby rejecting the position some have taken that *no* consumers find wireless service to be a complete alternative to wireline services.<sup>24</sup> The Commission stated in the *Qwest Four MSA Order* that including cut the cord wireless competition “reasonably approximates the extent to which residential telephony customers view mobile wireless service and wireline services as substitutes, and [this] is the approach most consistent with the Commission’s precedent.”<sup>25</sup> However, this conservative approach ignores the fact that wireless service competes with wireline service even among consumers who have both landline and wireless phones. As the data discussed below show, there is a high prevalence of wireless substitution among consumers who have not yet cut the cord and the percentage of consumers who are willing to cut the cord is likely even greater than the percentage of consumers who have already done so. In light of this data, the Commission should not limit its competitive analysis to cut the cord competition, and instead should expand its current approach and include *all* wireless competition.

Since the Commission decided the *Qwest Four MSA*, *Verizon Six MSA*, and *272 Sunset Orders*, consumers have continued to shift significant numbers of minutes from traditional wireline service to wireless phones. In addition, wireless providers have continued to invest heavily in their networks, and have also continued to compete aggressively against incumbent providers for mass market customers. Moreover, in recent years, several wireless providers including Sprint, AT&T, and Verizon Wireless have introduced unlimited service plans that

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<sup>24</sup> See *272 Sunset Order* ¶ 42 (2007).

<sup>25</sup> *Qwest Four MSA Order* ¶ 20. See also, Memorandum Opinion and Order, *Verizon Communications Inc. and MCI Inc., Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433 ¶ 91 (2005) (“*Verizon MCI Merger Order*”) (“Even if most segments of the mass market are unlikely to rely upon mobile wireless service in lieu of local wireline services today . . . our product market analysis only requires that there be evidence of sufficient substitution for significant segments of the mass market to consider it in our analysis.”).

effectively promote wireless service as a complete alternative to landline service.<sup>26</sup> T-Mobile has even targeted wireless customers who are not yet willing to disconnect their landline by offering its wireless customers VoIP-based land line service for as little as ten dollars a month (on top of the monthly wireless service charge).<sup>27</sup> In response to competition from wireless providers, many ILECs provide discounts on their traditional wireline service.<sup>28</sup> Providing further evidence that price matters, several analysts correctly predicted that the number of consumers who have cut the cord would increase during the recent recession as consumers looked to reduce their expenses by switching to a wireless phone exclusively.<sup>29</sup>

Recent data from the CDC demonstrate that approximately 40 percent of American households rely exclusively or primarily on wireless phones.<sup>30</sup> The CTIA has likewise reported that by the end of 2009 there were approximately 285.6 million wireless subscribers in the

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<sup>26</sup> J. Armstrong et al., Goldman Sachs, *4Q2007 North America Telecom Services Review* (Mar. 2008) (“In recent weeks, all four national carriers have announced unlimited voice plans, which we believe will serve to increase the rate of wireline substitution going forward, especially in a cyclical spending pullback. Consumers have never had the variety of voice calling options that are available now as substitute products.”).

<sup>27</sup> See T-Mobile website, [http://www.t-mobile.com/templates/generic.aspx?passet=pro\\_pro\\_hotspotathome](http://www.t-mobile.com/templates/generic.aspx?passet=pro_pro_hotspotathome) (describing T-Mobile’s @home service). As of March 23, 2010, T-Mobile ceased selling its @home landline service to new non-business customers. However, T-Mobile continues to provide this service to existing customers. See *T-Mobile Unplugs March 23*, available at <http://www.tmonews.com/2010/03/t-mobilehome-unplugs-march-23rd/>.

<sup>28</sup> See, e.g., Eric A. Taub, *Talk Is Cheap, if You Ask*, NYTimes.com (Apr. 29, 2009) (“[t]o keep customers from deserting their landlines, the traditional phone companies like AT&T and Verizon offer a slew of discounts”), available at <http://www.nytimes.com/2009/04/30/technology/personaltech/30basics.html>.

<sup>29</sup> See, e.g., Alan Fram, Associated Press, *Fifth of U.S. Homes Opt for Cell Phones Only* (May 6, 2009) (noting that “[f]or the first time, the number of U.S. households opting for cell phones outnumber those with only traditional landlines in a high-tech shift accelerated by the recession”) available at <http://www.msnbc.msn.com/id/30601416>; Reinhardt Krause, Investor’s Business Daily, *Recession Expected to Prod More Consumers to Cut the Cord* (Dec. 2, 2008) (noting that “[t]he slowing U.S. economy will likely speed up the ongoing shift to wireless-only phone service as consumers cut back on spending”) available at <http://www.cellular-news.com/story/34974.php>.

United States and the wireless penetration rate jumped to 91 percent of the total population.<sup>31</sup> The number of annual wireless minutes also continues to rise steadily as consumers continue shifting minutes from traditional wireline service to wireless phones. According to the CTIA, wireless subscribers placed more than 2.3 trillion minutes of wireless calls in 2009, an increase of more than two and a half times the number of annualized wireless minutes reported in 2005.<sup>32</sup> Analysts predict that the shifting of minutes from landlines to wireless phones will continue to increase in coming years.<sup>33</sup>

The CDC's wireless substitution data likewise confirm that the vast majority of Americans consider wireless phones to be suitable alternatives to traditional wireline phone service. According to the CDC, during the first half of 2009 "more than one of every five American homes (22.7%) had only wireless telephones"—a 2.5 percent increase since the second half of 2008, and an approximately 5 percent increase from the first six months in 2008.<sup>34</sup> This is more than double the 10.5 percent of households that had cut the cord in the first half of 2006.<sup>35</sup> Independent analysts have observed similar increases in the number of cut the cord households, with one analyst estimating that wireless substitution rates rose to 27 percent during 2009 and could reach as high as 31 percent during 2010.<sup>36</sup>

The CDC's data also demonstrate that the number of wireless mostly households—that is households with a landline and wireless service who receive mostly all of their calls on wireless

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<sup>30</sup> CDC Study at 1 (22.7% of households with a wireless phone exclusively and 14.7% of households with a landline received all or almost all calls on wireless telephones).

<sup>31</sup> See CTIA, *Wireless Quick Facts*.

<sup>32</sup> See *id.* (Reporting 2.3 trillion minutes in 2009, up from 1.5 trillion minutes in 2005).

<sup>33</sup> See Jessica Reif Cohen et al., Bank of America/Merrill Lynch, *Battle for the Bundle: Cable HSD – First Growth in Years*, at 8 (Mar. 2010) ("*March 2010 Bundle Report*").

<sup>34</sup> CDC Study at 1 and 2.

<sup>35</sup> *Id.* at Table 1.

phones—continues to rise. According to the CDC, “one of every seven American homes (14.7%)” with both a landline and wireless service received all or almost all calls on wireless phones.<sup>37</sup> For many consumers, the shifting of significant numbers of minutes from traditional wireline service to wireless phones is a critical first step towards cutting the cord.

Based on this evidence it is apparent that the vast majority of Americans consider wireless phones to be a suitable alternative to traditional landlines. Indeed, based on similar evidence the DOJ concluded that “[s]ubstantial information . . . demonstrate[s] that substitution from landline to mobile telecommunications services is having a noticeable effect on the number and usage of residential lines served by incumbent landline carriers.”<sup>38</sup> As demonstrated above, since the DOJ reached this conclusion, the prevalence of wireless substitution has increased significantly. Thus, there is no “evidence tending to show [that any] inframarginal customers” who do not view wireline and wireless as substitutes “are numerous enough” to prevent wireless services from constraining retail prices for mass market services.<sup>39</sup>

The Commission’s own data and statements further confirm that the vast majority of Americans view wireless phones as viable alternatives to traditional wireline service. In its July 2009 industry report, the Commission observed that wireless carriers had more than 255 million

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<sup>36</sup> See *March 2010 Bundle Report* at 10 (estimating that wireless substitution rose to 27 percent during 2009 and estimating that the number of cut-the-cord households will grow to 31 percent during 2010).

<sup>37</sup> *CDC Study* at 1.

<sup>38</sup> *November 2008 DOJ Study* at 61. To the extent the report went on to compare wireless and wireline prices, however, the analysis in the report is incomplete because, among other things, it excluded prices for bundled local and long-distance service, even though that is how a large and rapidly growing percentage of wireline customers purchase local service today. See *id.* at 66. With respect to substitution, the report also places considerable weight on evidence — namely the Rodini, Ward, and Woroch data, see *id.* at 66 n.364 — that the Commission has previously rejected on numerous grounds. See *Qwest Four MSA Order* ¶ 20 n.73; see generally Letter from Rashann Duvall, Verizon, to Marlene H. Dortch, FCC, at 18-20, WC Docket Nos. 08-24 & 08-49 (filed May 1, 2009) (discussing the *November 2008 DOJ Study* in greater detail).

<sup>39</sup> *Comcast v. Federal Communications Commission*, 579 F.3d 1, 7 (D.C. Cir. 2009).

subscribers, reflecting a roughly 140-percent increase from December 2004.<sup>40</sup> More recently, the Commission observed that “consumers are migrating away from traditional wireless phone service” and that “the vast majority of subscribers have a wireless phone in addition to a wireline phone - - a substantial increase from 1997, when there were only 55 million wireless subscribers.”<sup>41</sup> The Commission has further noted that “between December 2000 and December 2008, the number of wireless subscribers more than doubled, growing from 109.5 million to 270.3 million, and the wireless penetration rate jumped from 38 percent to 87 percent of the total population.”<sup>42</sup> Based on their own extensive analyses, numerous state commissions from California to New York have likewise concluded that wireless services compete with traditional wireline service.<sup>43</sup> The Virginia legislature has even passed legislation to that effect.<sup>44</sup>

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<sup>40</sup> See Industry Analysis and Technology Division, Wireline Competition Bureau, FCC, *Local Telephone Competition Status as of June 30, 2008*, Table 14 (Rel. July 2009), available at <http://www.fcc.gov/wcb/iatd/comp.html>.

<sup>41</sup> Order on Remand and Memorandum Opinion and Order, *High-Cost Universal Service Support*, 2010 FCC Lexis 2450 ¶ 14 (2010) (“USF Order”).

<sup>42</sup> *Id.*

<sup>43</sup> See, e.g., *Order Instituting Rulemaking into the Review of the California High Cost Fund Program*, Decision Adopting Phased Transition Plan for Pricing Basic Telephone Service, Rulemaking 06-06-028, Decision No. 08-09-042, at 42-43 (Cal. PUC Sept. 18, 2008) (“cross platform competition, particularly from wireless and VoIP technologies, constrains the ability of an ILEC to raise basic rates.”); Finding and Order, *Application of Verizon North Inc. for Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier 1 Services Pursuant to Chapter 4901:1-4*, Ohio Administrative Code, Case No. 08-989-TP-BLS, ¶ 36 (Ohio PUC Mar. 18, 2009) (relying on wireless in holding that Verizon “is subject to competition” for basic local exchange services and that customers “have reasonably available alternatives”); *Board Investigation Regarding the Reclassification of Incumbent Local Exchange Carrier (ILEC) Services As Competitive*, Order, Docket No. TX07110873, at 50 (N.J. BPU Aug. 20, 2008) (“The evidence overwhelmingly shows that competitors offer substitutes to the ILECs’ voice services. CLEC, cable, VOIP, and wireless providers all offer either stand alone and/or packages of services that consumers may, and do, purchase to replace ILEC services.”); *Possible Extension of Board Jurisdiction over Single Line Flat-Rated Residential and Business Rates for Local Exchange Carriers*, Final Order, Docket No. INU-08-1, at 10 (Iowa Utils. Bd. June 27, 2008) (“the Board finds that the current level of wireless competition in Iowa is a sufficient market force at this time to help discipline wireline prices and ensure reasonable service quality for many customers.”); *Application of Verizon Virginia Inc. and Verizon South Inc. for a Determination that Retail Services Are Competitive and Deregulating and Detariffing of the*

While there are some small segments of the population that may not yet regard wireless phones as alternatives to traditional wireline service, such as individuals over the age of sixty-five,<sup>45</sup> the CDC's data confirm that these segments are shrinking as more and more Americans rely primarily on wireless phones.<sup>46</sup> Accordingly, it would not be credible for the Commission to limit its analysis to cut the cord wireless competition, let alone entirely exclude wireless competition from its competitive analysis.

In evaluating the extent of wireless competition, the Commission should rely on the CDC's wireless substitution data, and in particular, the CDC's national rather than localized data. The CDC's wireless substitution data are among the most comprehensive and reliable data available today concerning the prevalence of wireless competition. The fact that the Commission cited to the CDC's national wireless substitution data in the Broadband Plan

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*Same*, Order on Application, Case No. PUC-2007-00008, at 22 (Dec. 14, 2007) (holding that given that "wireless service is an adequate substitute for *some* customers, and this number is growing" "it would underestimate the actual amount of competition to Verizon if we did not include wireless competition at all in determining market competitiveness."); Statement of Policy on Further Steps Toward Competition in the Intermodal Telecommunications Market and Order Allowing Rate Filings, Case 05-C-0616, at 54 (Apr. 11, 2006) (holding that competitive alternatives including wireless are "constraining incumbent prices and indeed are forcing incumbent prices down.").

<sup>44</sup> VA. Code Ann. § 56-235.5 (2010) requires the Virginia State Corporation Commission, when determining whether the telephone services of a telephone company are competitive, to consider "all wireless communications providers that offer voice communications services to be facilities based competitors owning wireline network facilities and reasonably meeting the needs of consumers."

<sup>45</sup> *CDC Study* at Table 2 (reporting that for January to June of 2009, the percentage of adults living in wireless-only households was in the double digits (ranging from 12.8% to as high as 45.8%), for adults between the ages of 18 and 64, compared to only 5.4 percent of adults over the age of sixty-five, and that the percentage of adults between the ages of 18 and 64 living in wireless mostly households was in the double digits (ranging from 16.5 to 20.3 percent) compared to only 5.3 percent of adults over the age of 65).

<sup>46</sup> *See also CDC Study* at Table 2 (reporting an increase in the percentage of adults over the age of 65 living in wireless only households from 1.3 percent during January to June of 2006 to 5.4 percent during January to June of 2009). *See also id.* at Table 4 (reporting an increase in the percentage of adults over the age of 65 living in wireless-mostly households from 3.4% during January to June of 2007 to 5.3% in January to June of 2009).

underscores the reliability of this data.<sup>47</sup> In addition, the Commission relied on the CDC's wireless substitution data in the *Verizon Six MSA Order*, an issue that was not disturbed in the D.C. Circuit's decision.<sup>48</sup> Moreover, because of the mobile nature of wireless service, the number of wireless telephone numbers in a particular geographic location at a specific point in time is not a full measure of the extent of wireless competition in that location. Unlike landline service, many wireless subscribers subscribe to wireless telephone service with the intention of keeping the same wireless number regardless of where they move in the country.

## 2. Cable

Data from numerous sources, including the Commission and the DOJ, have documented the rise and success of cable operators with mass market and business customers, including carrier customers. As the DOJ recognized, cable networks are virtually ubiquitous<sup>49</sup> and cable companies have already had "considerable success," and are "rapidly increasing their telephony business."<sup>50</sup> Cable companies continue to invest heavily in deploying Voice-over-Internet Protocol ("VoIP") capability throughout their networks and also in their ability to offer high-capacity services to enterprise customers over cable networks.<sup>51</sup> Cable companies are also deploying fiber networks through affiliates or business units dedicated to serving enterprise customers.<sup>52</sup>

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<sup>47</sup> FCC, *Connecting America: The National Broadband Plan*, at 251 (citing to CDC data on the number of wireless only households) available at <http://www.broadband.gov/plan/> (Mar. 2010).

<sup>48</sup> See *Verizon Six MSA Order* Appendix B, Note 2.

<sup>49</sup> *November 2008 DOJ Report* at 17, 33, 56.

<sup>50</sup> *November 2008 DOJ Study* at 15 and 17.

<sup>51</sup> See, e.g., *id.* at 47; US Telecom, *High-Capacity Services: Abundant, Affordable and Evolving*, at 9-10 & Table 1, 11-13 (July 2009), attached to Letter from Glenn T. Reynolds, US Telecom, to Marlene Dortch, FCC, WC Docket No. 05-25 & GN Docket No. 09-51 (filed July 16, 2009) ("*US Telecom Report*").

<sup>52</sup> *US Telecom Report* at 10, 11 & Table 2.

In the mass market segment, large numbers of ILEC customers have already migrated to cable telephony services. According to recent data, cable companies served more than 22 million residential voice customers as of the end of 2009.<sup>53</sup> Analysts predict that the number of mass market customers switching to cable voice services will continue to increase and that cable companies will serve an estimated 23-24 million residential voice subscribers by the end of 2010, and 25 million subscribers by the end of 2012.<sup>54</sup>

Cable companies have also experienced significant success in serving all types of business customers and are aggressively targeting enterprise customers, particularly small and medium-sized businesses, the primary purchasers of incumbent providers' DS1 and DS3 special access services. In response to significant competitive pressure from cable and other intermodal providers in the provision of regulated high-capacity services, incumbent providers offer a number of discount plans that provide customers with substantial discounts on regulated special access services.<sup>55</sup> These discount plans contributed to the significant declines of about 24 percent in the real prices customers paid Verizon for regulated special access services between 2002 and 2008.<sup>56</sup>

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<sup>53</sup> See *March 2010 Bundle Report* (22.3 million subscribers as of the end of 2009); Timothy Horan et al., Oppenheimer, *1Q10 Wireline Preview*, at 14, Exhibit 12 (Apr. 13, 2010) (21.4 million subscribers as of the end of 2009); Christopher King et al., Stifel Nicolaus, *3Q09 Battleground Report: Telcos vs. Cable*, at 11 (Nov. 16, 2009) (22.3 million subscribers as of 3Q09).

<sup>54</sup> Timothy Horan et al., Oppenheimer, *1Q10 Wireline Preview*, at 14, Exhibit 12 (Apr. 13, 2010) (estimating cable will serve 22.8 million voice subscribers by the end of 2010 and 24.8 million voice subscribers by the end of 2012); See *March 2010 Bundle Report* at 12 (estimating that cable will serve 24 million voice subscribers in 2010).

<sup>55</sup> See generally, Attachment B Declaration of Quintin Lew and Anthony Recine, WC Docket. No. 05-25 (filed Mar. 19, 2010) ("*Lew/Recine Declaration*") (describing Verizon's special access discount pricing plans).

<sup>56</sup> See *id.* ¶ 9 ("[t]he substantial discounts provided under Verizon's generally available discount plans are a major driving force behind the significant declines in the real prices customers paid Verizon for special access services between 2002 and 2008.")

Based on cable operators' own public statements, as of 2009, the top five cable companies claim to serve, collectively, nearly 1 million business customers and generate annual business revenues of approximately \$3 billion, which are growing by 15-20 percent or more annually as of 2009.<sup>57</sup> Independent analyst reports have confirmed these statements from cable companies, noting that even during the current recession "[c]able operators continue to gain share and demonstrate growth in the Small to Medium enterprise" market segment."<sup>58</sup> Cable companies have also continued to invest heavily in facilities used to provide business services. Indeed, Comcast recently reported that its business services revenues increased by 49.1 percent in the first quarter of 2010.<sup>59</sup> Between 2008 and 2009, Comcast increased its capital expenditures for business services alone by about 50%, even while its overall capital

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<sup>57</sup> See, e.g., *Q4 2009 Comcast Corporation Earnings Conference Call – Final*, FD (Fair Disclosure) Wire, Transcript 020310a2639739.739 (Feb. 3, 2010) (Comcast Corp. EVP & CFO Michael Angelakis: "Business services has experienced real momentum over the past year, with revenue increasing 48% to \$828 million for 2009"); *Time Warner Cable, Inc. at Credit Suisse Group Global Media and Communications Conference – Final*, FD (Fair Disclosure) Wire, 031010a2788319.719 (Mar. 10, 2010) (Time Warner Cable Senior EVP & CFO Rob Marcus: "[A]bout three years ago, we had a business that was just over half of \$1 billion. Last year, we were north of \$900 million. We have said that, in 2010, we're going to grow the business by 20% or more."); *Q4 2009 Charter Communications Inc. Earnings Conference Call – Final*, FD (Fair Disclosure) Wire, Transcript 030210a2782449.749 (Mar. 2, 2010) (Charter CEO Michael Lovett: "Charter has been in the commercial business for six year[s], and it's now a \$450 million business. The commercial sector contributes meaningfully to our growth with a 14% increase in revenues year-over-year."); *U.S. Telecom Report* at 9-10 & Table 1 (July 2009), [http://www.ustelecom.org/uploadedFiles/News/News\\_Items/High.Capacity.Services.pdf](http://www.ustelecom.org/uploadedFiles/News/News_Items/High.Capacity.Services.pdf) (cable business customers). See also Jessica Reif Cohen et al., Bank of America/Merrill Lynch, *Battle for the Bundle: Cable HSD – First Growth in Years*, at 16, Table 9 (Mar. 29, 2010) (estimating 2009-2012 year-over-year SME growth of 48-55 percent for Comcast and 19-30 percent for Time Warner Cable).

<sup>58</sup> *March 2010 Bundle Report* at 11.

<sup>59</sup> Comcast Presentation, 1<sup>st</sup> Quarter 2010 Results, at 5 (Apr. 28, 2010); available at: [http://files.shareholder.com/downloads/CMCSA/812865807x0x369979/193163df-512e-46db-bd5b-b9843c90b1b4/Comcast\\_Q110Slides\\_4.27.10.pdf](http://files.shareholder.com/downloads/CMCSA/812865807x0x369979/193163df-512e-46db-bd5b-b9843c90b1b4/Comcast_Q110Slides_4.27.10.pdf). ("Comcast Presentation, 1<sup>st</sup> Quarter 2010 Results").

expenditures declined.<sup>60</sup> Comcast has indicated that it plans to continue investing in its business services in 2010.<sup>61</sup> Similarly, Time Warner Cable reported that for the first quarter of 2010, its business services revenues increased by 19.2 percent from the first quarter in 2009 to \$254 million.<sup>62</sup> Time Warner Cable has also indicated that its capital expenditures for business services increased by 81.3 percent between January 1, 2010 and March 31, 2010.<sup>63</sup>

Recent reports from cable companies also demonstrate that cable companies are aggressively pursuing opportunities to provide backhaul services and have already experienced tremendous success in providing backhaul services. For example, Comcast has indicated that it expects backhaul to become a \$1 billion over time.<sup>64</sup> Craig Collins, senior vice president of business services for Time Warner Cable has stated that “[b]ackhaul is a growth play that we are pursuing aggressively.”<sup>65</sup> For the first quarter of 2010, Time Warner Cable reported backhaul revenues of \$13 million, a year-over-year increase of 225 percent.<sup>66</sup> Cox’s Vice President Phil Meeks has indicated that backhaul services are “a very healthy and fast-growing business,” with

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<sup>60</sup> Thomson Street Events, Transcript, Comcast Corporation and Morgan Stanley Technology, Media & Telecom Conference, at 8 (Mar. 2, 2010).

<sup>61</sup> *Comcast Presentation, 1<sup>st</sup> Quarter 2010 Results*, at 7.

<sup>62</sup> Time Warner Cable Presentation, First-Quarter 2010 Results, at 3, 5, 6 (Apr. 29, 2010); available at: <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NDM1NTN8Q2hpbGRJRD0tMXxUeXBIPtM=&tid=1>.

<sup>63</sup> *Id.* at 9.

<sup>64</sup> Kelly Riddell and Amy Thomson, Bloomberg News, *Cable Looks to Ease Smartphone Jams: Time Warner Pitches Wireless Backhaul Service to AT&T, Verizon in Bid to Expand Market* (Mar. 14, 2010) available at <http://www.ohio.com/business/87609542.html>.

<sup>65</sup> *Id.*

<sup>66</sup> Time Warner Cable Presentation, First-Quarter 2010 Results, at 6 (Apr. 29, 2010); available at: <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NDM1NTN8Q2hpbGRJRD0tMXxUeXBIPtM=&tid=1>.

Cox signing \$100 million in backhaul contracts in 2009.<sup>67</sup> Reports from wireless providers' confirm cable companies' statements about their tremendous success in providing backhaul services. For example, T-Mobile recently told investors that it already uses "alternate backhaul providers" for more than 40 percent of its 3G cell sites, and plans to increase its use of alternate backhaul services to more than 75 percent by the first half of 2011.<sup>68</sup>

### 3. IP-based Service Providers

The Commission's own statements confirm that VoIP services from cable operators and other IP-based providers compete with traditional wireline services. For example, the Commission has expressly stated that "more and more customers have the option to purchase voice service from competing broadband-based VoIP providers."<sup>69</sup> The Commission has also recognized that "[i]nterconnected VoIP service subscribers represent an important and rapidly growing part of the U.S. voice service market, and interconnected VoIP services are increasingly competitive with other forms of local telephone service."<sup>70</sup>

The Commission's statements are consistent with IP-based providers' public statements about their subscribership and plans for expansion. Vonage, the largest over-the-top VoIP provider, serves approximately 2.4 million subscribers nationwide, a more than six hundred percent increase from December 2004.<sup>71</sup> Clearwire offers voice and Internet bundles over its

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<sup>67</sup> Kelly Riddell and Amy Thomson, Bloomberg News, *Cable Looks to Ease Smartphone Jams: Time Warner Pitches Wireless Backhaul Service to AT&T, Verizon in Bid to Expand Market* (Mar. 14, 2010) available at <http://www.ohio.com/business/87609542.html>.

<sup>68</sup> T-Mobile, Duetsche Telekom Investor Day, T-Mobile USA: Regaining U.S. Market Position, at 21 (Mar. 18, 2010) available at <http://www.deutchetelekom.com/dtag/cms/content/dt/en/798526;jsessionid=4B90EFAF1A4C887CAAA3673C69627D48>

<sup>69</sup> *USF Order* ¶ 17.

<sup>70</sup> Report and Order and Further Notice of Proposed Rulemaking, *Development of Nationwide Broadband Development of Data*, 23 FCC Rcd 9691, ¶ 26 (2008).

<sup>71</sup> See Vonage Press Release, *Vonage Holdings Corp. Reports Fourth Quarter and Full Year 2009 Results*, (Feb. 25, 2010), available at

extensive 4G WiMax network covering more than 34 million people in 27 U.S. markets.<sup>72</sup>

Clearwire reported that as of the Fourth Quarter of 2009, it had approximately 688,000 retail and wholesale subscribers, and expects that its 4G network will cover up to 120 million people in 2010 and also anticipates that its 4G subscriber level will triple.<sup>73</sup> Skype's "SkypeOut" service, which allows customers to make VoIP-originated calls to wireline and wireless phones for a fee, has grown from 4.1 billion minutes in 2006 to 10.6 billion minutes in June 2009.<sup>74</sup>

#### 4. Fixed Wireless

Incumbent providers also face extensive competition from fixed wireless providers with respect to providing high-capacity services, particularly with respect to serving business customers, including other carriers. Several fixed wireless providers such as FiberTower, have acquired substantial amounts of spectrum across the country, and more than a dozen fixed wireless providers offer service and plan to expand into new markets, including markets outside of the top 50 MSAs.<sup>75</sup> Fixed wireless providers offer high-speed connections ranging from DS1 to Gigabit Ethernet to OCn, and also offer speeds that are in between incumbents' standard DS1 and DS3 offerings, while offering the same kind of high-level service guarantees, specifically to appeal to businesses with needs that fall within this range.<sup>76</sup> Like cable operators, fixed wireless

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<http://ir.vonage.com/releasedetail.cfm?ReleaseID=447133>; Vonage Press Release, *Vonage Crosses 400,000 Line Mark* (Jan. 5, 2005), available at <http://ir.vonage.com/releasedetail.cfm?ReleaseID=194545>.

<sup>72</sup> See Clearwire News Release, Clearwire Reports Fourth Quarter and Full Year 2009 results (Feb. 24, 2010), available at <http://investors.clearwire.com/phoenix.zhtml?c=198722&p=irol-newsArticle&id=1394717>.

<sup>73</sup> See *id.*

<sup>74</sup> See eBay Inc., Form 10-Q at 20 (SEC filed July 29, 2009) (data for minutes 1H09 and 1H08); eBay Inc., Form 10-K at 51 (SEC filed Feb. 20, 2009) (data for 2006 and 2008).

<sup>75</sup> *US Telecom Report* at 17-19 & Tables 4, 5.

<sup>76</sup> *Id.* at 20.

providers are aggressively targeting business customers, including carrier customers and wireless providers, and have signed up thousands of business customers, and are growing rapidly.<sup>77</sup>

Clearwire, which is majority owned by and provides backhaul services to Sprint at “preferred rates” has indicated that in most of its markets, “whether the networks utilize pre-4G, mobile WiMax or some other technology, we intend to rely primarily on microwave backhaul.”<sup>78</sup> Clearwire also claims to have “one of the largest wireless backhaul networks in the world”<sup>79</sup> and has told analysts that it is investing in microwave equipment so it can self-provision facilities to meet “roughly 80 percent of its [wireless] backhaul . . . from microwave links.”<sup>80</sup> Similarly, FiberTower has stated that it “leads the nation in providing backhaul services,” and already “provides backhaul service to over 6,000 mobile base stations (or cell sites) in 13 [major] markets.”<sup>81</sup> Verizon Wireless recently selected FiberTower to provide backhaul services for the roll out of its 4G network rollout in portions of Ohio and Michigan.<sup>82</sup>

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<sup>77</sup> See *id.* at 22-23.

<sup>78</sup> Sprint Nextel/Clearwire WiMax Call-Final, Fair Disclosure Wire, Transcript 050708a1844939.739 (May 7, 2008) (statement by Ben Wolff, Chief Executive officer, Clearwire); Clearwire News Release, Clearwire Reports Fourth Quarter and Full Year 2009 results (Feb. 24, 2010) *available at*: <http://investors.clearwire.com/phoenix.zhtml?c=198722&p=irol-newsArticle&id=1394717>.

<sup>79</sup> *Leap Wireless International at Jefferies Panel Discussion*, Fair Disclosure Wire, Transcript 090908ay.703 at 8 (Sept. 9, 2008) (statement by Scott Richardson, Chief Strategy Officer, Clearwire).

<sup>80</sup> John Hodulik, UBS Investment Research, *Clearwire Corp.* at 13 (Dec. 19, 2008).

<sup>81</sup> Written Testimony of Ravi Potharlanka, Chief Operating Officer, FiberTower Corporation: House Energy and Commerce Committee’s Subcommittee on Communications, Technology and the Internet; Hearing: Competition in the Wireless Industry, *available at* [http://energycommerce.house.gov/Press\\_111/20090507/testimony\\_potharlanka.pdf](http://energycommerce.house.gov/Press_111/20090507/testimony_potharlanka.pdf), at 3 and 4 (May 7, 2009).

<sup>82</sup> Press Release, FiberTower Corporation, *FiberTower’s Backhaul Solution Helps Verizon Wireless Bring the Nation’s First 4G LTE Network to Ohio and Michigan*, (Mar. 24, 2010) *available at* [http://www.fibertower.com/corp/downloads/press\\_releases/CTIA%202010%20LTE%20Backhaul%20-%20FiberTower%20Final.pdf](http://www.fibertower.com/corp/downloads/press_releases/CTIA%202010%20LTE%20Backhaul%20-%20FiberTower%20Final.pdf).

Like Verizon Wireless, many other wireless providers have shifted significant backhaul business to fixed wireless providers. U.S. Cellular Corp. has indicated that it “makes very extensive” use of fixed wireless to provide backhaul services between its base stations and also between its base stations and its switches.<sup>83</sup> Similarly, Hilbert Communications, a provider of “roaming network services throughout Wisconsin for about 30 carriers” recently reported that it was “eliminating the 150 leased T1 lines that it uses to connect its cell sites” and replacing them with microwave wireless backhaul facilities.<sup>84</sup> Ed Evans, CEO of Stelera Wireless, has likewise explained to the Commission that “we don’t have a problem with back haul because we’re using 300 MIP microwave off of those cell sites, so I’ve got plenty of back haul capacity to go back.”<sup>85</sup>

Fixed wireless providers also market their services to competitive fiber carriers, which are using the service to replace leased wireline circuits in their networks. For example, FiberTower provides service to both Verizon Business and Qwest, while XO is replacing leased wireline circuits with wireless solutions from its Nextlink subsidiary.<sup>86</sup> XO/Nextlink provides “a high speed wireless alternative to local copper and fiber connections, utilizing licensed wireless spectrum.”<sup>87</sup> XO/Nextlink’s “primary target customers are mobile wireless and wireline telecommunications carriers, large commercial enterprises and government agencies” and

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<sup>83</sup> Comments of U.S. Cellular Corporation, WT Docket No. 09-106, at 1 (filed Jul. 27, 2009).

<sup>84</sup> Jessica Scarpati, *Rural Wireless Operator Ditches T1s for Microwave Backhaul Plan*, Telecom News, Feb. 25, 2010, available at [http://searchtelecom.techtarget.com/news/article/0,289142,sid103\\_gci1394530,00.html](http://searchtelecom.techtarget.com/news/article/0,289142,sid103_gci1394530,00.html)

<sup>85</sup> See FCC National Broadband Plan Workshop, Wireless Broadband Deployment – General, Tr. at 42-43 (Aug. 12, 2009).

<sup>86</sup> See *id.* at 22.

<sup>87</sup> XO Holdings Inc., Form 10-Q, available at [http://www.xo.com/SiteCollectionDocuments/about-xo/investor-relations/Annual\\_Reports/XOH\\_1Q\\_2009\\_10Q.pdf](http://www.xo.com/SiteCollectionDocuments/about-xo/investor-relations/Annual_Reports/XOH_1Q_2009_10Q.pdf) at 11 (March 31, 2009).

XO/Nextlink “currently offers wireless backhaul, network extensions, network redundancy and diversity services.”<sup>88</sup>

**B. Including Intermodal Competition in the Commission’s Analysis is Warranted Under Both the Impairment and Forbearance Standards**

Despite abundant evidence of intermodal competition, some commenters will undoubtedly suggest that the Commission’s analytical framework should exclude all or some types of intermodal competition.<sup>89</sup> However, excluding intermodal competition would conflict with the extensive evidence of intermodal competition and would also be inconsistent with both the impairment and forbearance standards. Under both the impairment and forbearance standards, the focus is on “competition” and “consumers” and not on protecting particular competitors.<sup>90</sup> In interpreting the impairment standard, the D.C. Circuit has twice held that the “[c]ommission cannot ignore intermodal intermodal alternatives” in assessing impairment.<sup>91</sup> Those D.C. Circuit holdings followed from the Supreme Court’s holding that the Commission cannot, “consistent with [§ 251(d)(2)], blind itself to the availability of elements outside the incumbent’s network,” which includes intermodal alternatives.<sup>92</sup> Accordingly, if the Commission applies the impairment standard here, and it should, the Commission’s analysis must include intermodal competition.

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<sup>88</sup> *Id.*

<sup>89</sup> See, e.g., Comments of PAETEC, WC Docket Nos. 06-172 and 07-97, 6-7, 29-32 (filed Sept. 21, 2009) Comments of Broadview Networks, Inc. et al. WC Docket Nos. 06-172 and 07-97, 14-21 (filed Sept. 21, 2009); Comments of CBeyond et al., WC Docket Nos. 06-172 and 07-97, at 18, 27-30 (filed Sept. 21, 2009); Comments of Comptel, WC Docket Nos. 06-172 and 07-97, at 17, 20 (filed Sept. 21, 2009) (all arguing that the Commission should ignore intermodal competition and retain unbundling unless there are multiple “wireline” competitors offering wholesale services in a particular area).

<sup>90</sup> 47 U.S.C. § 160(a)-(b); 47 U.S.C. § 251 (d)(2); *Verizon Telephone Companies v. FCC*, 570 F.3d 294, 300 (D.C. Cir. 2009.)

<sup>91</sup> *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 572-73 (D.C. Cir. 2004) (“*USTA II*”) (Subsequent History Omitted); *United States Telecom Ass’n v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2004) (“*USTA I*”).

In addition, intermodal competition is highly relevant to the inquiry the Commission is required to undertake under the forbearance standard. With respect to the first prong of the forbearance standard—which focuses on whether the regulation at issue is necessary to ensure that rates remain just and reasonable—intermodal competitors, including cable, IP-based providers, wireless providers, and fixed wireless providers exert significant competitive pressure on incumbents across all market segments, ensuring that incumbents’ rates remain just and reasonable.<sup>93</sup> As antitrust scholars have recognized, a firm “in an innovative industry faces competition” where “competitors with different technologies and resources compete on the basis of product attributes and performance as well as price.”<sup>94</sup> Indeed, incumbents offer numerous discounts on mass-market services and tariffed DS-1 and DS-3 services in an effort to keep customers’ business.<sup>95</sup>

With respect to the second prong—which focuses on whether the regulation at issue is necessary to protect consumers—intermodal competition protects consumers because it is not based on UNEs, and therefore encourages the deployment of new facilities and services.<sup>96</sup> As Justice Breyer previously explained, “meaningful competition” will emerge “in the *unshared*, not in the shared, portions, of the enterprise.”<sup>97</sup> For this reason, courts have “reaffirm[ed]” that the

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<sup>92</sup> *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389 (1999).

<sup>93</sup> *See* 47 U.S.C. § 160 (a)(1).

<sup>94</sup> Jerry Ellig, ed., *Dynamic Competition and Public Policy: Technology, Innovation, and Antitrust Issues 2* (2001).

<sup>95</sup> *See, e.g.*, Eric A. Taub, *Talk Is Cheap, if You Ask*, NYTimes.com (Apr. 29, 2009) (“[t]o keep customers from deserting their landlines, the traditional phone companies like AT&T and Verizon offer a slew of discounts”), available at <http://www.nytimes.com/2009/04/30/technology/personaltech/30basics.html>; *Lew/Recine Declaration* (discussing Verizon’s numerous special access discount pricing plans).

<sup>96</sup> *See* 47 U.S.C. § 160 (a)(2).

<sup>97</sup> *AT&T Corp.*, 525 U.S. at 429.

Commission “cannot ignore intermodal alternatives” to incumbents’ networks when addressing unbundling.<sup>98</sup>

Finally, intermodal competition informs the third criteria for forbearance—whether forbearance is in the public interest. The D.C. Circuit has explained that, in the context of the local competition requirements in the Act, the “public interest” is “to stimulate competition—preferably genuine, facilities-based competition”, which is precisely what intermodal competition is.<sup>99</sup>

### **III. The Commission’s Analytical Framework Should be Forward-Looking and Should Include Both Actual and Potential Competition From Existing and Emerging Competitors**

#### **A. The Commission and the Courts Have Held Consistently That Both Potential and Actual Competition Should be Included in Evaluating Competitive Conditions in Dynamic Marketplaces**

Consistent with Commission and court precedent, the Commission’s analytical framework should include both actual and potential competition. The rapidly changing nature of the communications industry has led the Commission and the courts to hold consistently that a proper competitive analysis should include potential competition. The prior Commission and court precedent on these issues are in line with the approach recommended under the *Guidelines* and the proposed revisions to the *Guidelines*. As the existing *Guidelines* indicate, market share measures should “be calculated using the best indicator of firms’ *future* competitive significance.”<sup>100</sup> The *Guidelines* also explain that for purposes of assessing potential competition, the focus should be on “entry alternatives that can be achieved within two years from initial planning to significant market impact.”<sup>101</sup> The proposed revisions to the *Guidelines*

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<sup>98</sup> *USTA II*, 359 F.3d at 572.

<sup>99</sup> *Id.* 576.

<sup>100</sup> *Guidelines* § 1.41 (emphasis added).

<sup>101</sup> *Id.* § 3.2.

likewise stress the importance of considering potential competition from emerging entrants as well as existing competitors that may not yet serve a particular geographic area, but could do so. Specifically, the proposed revisions state that “[f]irms not currently earning revenue in the relevant market, but that have committed to entering the market in the near future, are also considered market participants.”<sup>102</sup> The proposed revisions to the *Guidelines* also indicate that “[f]irms that are not current producers in a relevant market, but that would very likely provide rapid supply responses with direct competitive impact in the event of a [Small but Significant and Non-transitory Increase in Price] are also considered market participants.”<sup>103</sup> The Commission’s competitive analysis here should not depart from court and Commission precedent or DOJ and FTC guidance on the issue of potential competition.

Under the statutory impairment standard, the issue of whether potential competition should be considered is beyond dispute because the statutory standard expressly refers to the “ability” of competitors to compete without UNEs.<sup>104</sup> Indeed, the D.C. Circuit has repeatedly held that the impairment standard requires the Commission to consider the “potential for competition” before requiring unbundling and has also held that competitors are not impaired when “competition is possible” without UNEs.<sup>105</sup> This conclusion flows directly from the statute’s language, which allows the Commission to require unbundling only where its absence “would impair the ability” of a competitor to compete.<sup>106</sup> For this reason, as the D.C. Circuit explained, the Commission has “repeatedly justifie[d] its unbundling determinations [in the

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<sup>102</sup> Department of Justice, *Horizontal Merger Guidelines: For Public Comment* at 15-16 (Rel. Apr. 20, 2010); available at <http://www.ftc.gov/os/2010/04/100420hmg.pdf>.

<sup>103</sup> *Id.*

<sup>104</sup> 47 U.S.C. 251(d)(2).

<sup>105</sup> *Covad Communications Co. v. FCC*, 450 F.3d 528, 540-41 (D.C. Cir. 2006); *USTA II*, 359 F.3d at 575.

<sup>106</sup> 47 U.S.C. § 251(d)(2)(B).

*Triennial Review Remand Order*] on the basis of both actual and potential competition”, and cited numerous instances in that order in which the Commission did so.<sup>107</sup>

The Commission’s prior UNE forbearance decisions, which were decided under the forbearance standard, confirm that potential competition should also be included under that standard. As the D.C. Circuit found, the Commission has “consistently considered *both* actual and potential competition” in determining whether the criteria under the forbearance standard were met.<sup>108</sup> The D.C. Circuit’s opinion did not disturb these prior Commission decisions.<sup>109</sup>

As the Commission found in its prior orders, given the dynamic nature of the marketplace, it is critical that analytical framework used here includes both actual and potential competition from existing and emerging providers. As the Commission has previously acknowledged, competition “is more appropriately analyzed in view of larger trends in the marketplace, rather than exclusively through the snapshot data that may quickly and predictably be rendered obsolete as th[e] market continues to evolve.”<sup>110</sup> The Commission has further explained that snapshots of an incumbent’s market share are necessarily “premised on data that are both limited and static” because they “fail to recognize the dynamic nature of marketplace forces,” including the growth of and investment in “*existing and developing* platforms.”<sup>111</sup> The

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<sup>107</sup> *Covad*, 450 F.3d at 540.

<sup>108</sup> *Verizon*, 570 F.3d at 303.

<sup>109</sup> While the D.C. Circuit’s decision indicated that in some instances it may be reasonable for the Commission to focus on a lack of actual competition to date, it did not suggest that the Commission could ignore the availability of competitive alternatives and potential new competitive alternatives as a matter of course. *Verizon*, 570 F.3d at 304.

<sup>110</sup> Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, ¶ 50 (2005).

<sup>111</sup> *Id.* (emphasis added); See also Report and Order, *Petition on Behalf of the State of Hawaii, Public Utility Commission for Authority to Extend Its rate Regulation of Commercial Mobile Radio Services in the State of Hawaii*, 10 FCC Rcd 7872, ¶ 26 (1995) (“evidence concerning dynamic factors” such as “growth and investment” is a “more persuasive market indicator than evidence concerning static factors” such as “prices or rates of return.”); Second Report and Order, *MTS-WATS Market Structure Inquiry*, 92 F.C.C. 2d 787, ¶ 133 (1982)

Commission’s prior orders also acknowledge that a market share-based analysis “may misstate the competitive significance of existing firms and *new entrants*.”<sup>112</sup> The Commission has further recognized that “the presence and capacity of other firms matter more for *future competitive conditions*, than do current subscriber-based market shares.”<sup>113</sup> Nothing has changed that would justify a departure from this long line of precedent or the *Guidelines*.

**B. Consistent With Prior Commission and Court Decisions, the Commission Should Reject Calls to Use Backwards-Looking Market Share-Based Measures in This Dynamic Marketplace**

The Commission has consistently and correctly refused to apply traditional market share measures in dynamic marketplaces like the type present here. For example, in the *Triennial Review Order*, the Commission, relying on the language in Section 251, declined to “determine impairment based on . . . whether certain thresholds of [ ] competition have been met.”<sup>114</sup> The Commission has similarly found that assessing “the level of competition for LEC services based solely on a LEC’s market share at a given point in time would be too static and one-dimensional.”<sup>115</sup> Therefore, the Commission has held that it will “consider technological and market changes, and the nature, complexity, and speed of change of, as well as trends within, the communications industry.”<sup>116</sup> As the D.C. Circuit observed, the Commission’s prior UNE forbearance orders did not apply a market-share based analysis, and in fact rejected calls to apply

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(“Regulatory policy must take cognizance of the dynamic factors existing in the marketplace. It should not be based solely on static conditions existing today.”).

<sup>112</sup> *Verizon MCI Merger Order*, ¶ 74 (emphasis added).

<sup>113</sup> Memorandum Opinion and Order, *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of Licenses and Authorizations*, 19 FCC Rcd 21522 ¶ 148 (2004) (“*AT&T/Cingular Wireless Merger Order*”) (emphasis added).

<sup>114</sup> *TRO* ¶ 114.

<sup>115</sup> Second Further Notice of Proposed Rulemaking, *Price Cap Performance Review for Local Exchange Carriers*, 11 FCC Rcd 858, ¶ 143 (1995).

<sup>116</sup> *AT&T/Cingular Wireless Merger Order* ¶ 41.

a traditional market share review.<sup>117</sup> The Commission has applied these principles not only in its UNE forbearance rulings, as the D.C. Circuit found, but also in a host of other contexts where, as here, there are dynamic and emerging competitors with effects not reflected in a static market-share analysis.<sup>118</sup> The D.C. Circuit has repeatedly held that it is reasonable for the Commission not to use a market share analysis in dynamic marketplaces with emerging competitors and technologies.<sup>119</sup>

The Commission should not depart from the prior Commission and court decisions on this issue. Indeed, the use of market share-based measures is neither required nor appropriate under either the forbearance or impairment standard. The D.C. Circuit has held that the forbearance standard “imposes no particular mode of analysis”<sup>120</sup> and reaffirmed that holding in *Verizon*.<sup>121</sup> Further, the Commission has correctly concluded that unbundling is wholly unrelated to market power or the lack thereof. In the *Triennial Review Order*, the Commission expressly rejected the notion that it “should require the unbundling of network elements to

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<sup>117</sup> *Verizon*, 570 F.3d at 393 (“the FCC’s reliance on an ILEC’s actual market share as the essential factor in its UNE forbearance analysis is contrary to its precedent in the *Omaha* and *Anchorage Orders*”).

<sup>118</sup> See also, e.g., First Report and Order and Further Notice of Proposed Rule Making, *Amendment of Parts 2 and 25 of the Commission’s Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range*, 16 FCC Rcd 4096, ¶ 298 (2000) (noting that market share of direct broadcast satellite (“DBS”) firms in multichannel video programming distribution market “may understate their competitive importance” given the “fast growth of DBS”); Report and Order, *Petition of the People of the State of California and the Public Utilities Commission of the State of California To Retain Regulatory Authority over Intrastate Cellular Service Rates*, 10 FCC Rcd 7486, ¶ 103 (1995) (rejecting California commission’s static analysis of wireless market because it did “not fairly reflect the speed at which [the commercial mobile radio services] market structure conditions affecting cellular services are evolving”).

<sup>119</sup> *Earthlink, Inc. v. FCC*, 462 F.3d 1, 9 (D.C. Cir. 2006) (“Given the FCC’s view of the broadband market as still emerging and developing, it reasonably eschewed a more elaborate snapshot of the current market in deciding whether to forbear with respect to the fiber network elements at issue here”); *Verizon*, 570 F.3d at 303.

<sup>120</sup> *Earthlink*, 462 F.3d at 8, *Verizon*, 570 F.3d at 304.

<sup>121</sup> *Verizon*, 570 F.3d at 304.

remove an incumbent LEC's market power in the retail market".<sup>122</sup> The Commission further explained that "[t]he purposes of a market power analysis are not the purposes of section 251(d)(2)," because the 1996 Act "requires only that network elements be unbundled if competing carriers are impaired."<sup>123</sup> The Commission has reached the same conclusion for the wholesale segment, stating that "an analysis that focused exclusively on" alleged market power in wholesale offerings "would fail to give weight to the possibility or actuality of self provisioning."<sup>124</sup> There is no basis for the Commission to depart from these well-reasoned decisions, which preclude the Commission from limiting its assessment of whether "a marketplace is . . . sufficiently competitive" to lift particular unbundling requirements solely to determining whether the incumbent's market share has fallen below a particular level.<sup>125</sup> And, as the D.C. Circuit explained, given this long line of precedent, any decision to use a dispositive market share test to decide whether forbearance is warranted would require a "reasoned explanation."<sup>126</sup> The Commission could not provide such an explanation here.

In addition to the long line of precedent on this issue, the static nature of traditional market share measures renders them inappropriate tools for assessing competitive conditions in dynamic marketplaces. Indeed, the DOJ recently recognized that "[i]n any industry subject to significant technological change, it is important that the evaluation of competition be forward-looking rather than based on static definitions of products and services."<sup>127</sup> The proposed revisions to the *Guidelines* further explain that "[t]he agencies consider reasonably predictable effects of recent or ongoing changes in market conditions in interpreting market concentration

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<sup>122</sup> *Triennial Review Order* ¶ 109.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* ¶ 110.

<sup>125</sup> *Verizon*, 570 F.3d at 304.

<sup>126</sup> *Id.* at 302.

<sup>127</sup> *DOJ Comments* at 6.

and market share data.”<sup>128</sup> Similarly, the leading antitrust treatise observes that “a variety of circumstances may indicate that a firm’s market share” does not accurately indicate its “present or future competitive role.”<sup>129</sup> This guidance confirms what the Commission and the courts have already decided in rejecting the use of traditional market share-based measures in dynamic marketplaces.

In addition, traditional market share measures are not meaningful in marketplaces that have high fixed costs, as is the case here. As the DOJ has recognized, “[i]n markets . . . with differentiated products subject to large economies of scale (relative to the size of the market), the Department does not expect to see a large number of suppliers.”<sup>130</sup> Similarly, in the special access proceeding, Dr. Topper explained that “[m]arkets with a relatively small number of competitors can exhibit vigorous competition and yield large consumer benefits despite the fact that their structure is not entirely consistent with the textbook model of a perfectly competitive market.”<sup>131</sup> Therefore, the Commission should not base its decision on the number of competitive providers in the MSA at issue here.

Administrative considerations provide further support for rejecting calls to use a market share-based approach here. As the Commission has previously recognized, “market power analyses are neither easily verifiable nor administratively simple”; instead, they are “complicated,” “require[] considerable time and expense to prepare,” and are “controversial and difficult to resolve.”<sup>132</sup> Given that the Commission has less than two months before the deadline for deciding Qwest’s Petition, attempting a complicated market share analysis is particularly unsuited here. If the Commission were even to attempt a traditional market share-based analysis

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<sup>128</sup> *Guidelines* §1.521.

<sup>129</sup> 4 Philip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 950b, at 270 (3d ed. 2009).

<sup>130</sup> *DOJ Comments* at 7.

<sup>131</sup> *Topper Declaration* ¶ 5.

here, and it should not, it would have to resolve debates about the appropriate product market and would also have to collect data from *all* relevant providers, whether actual or potential. These same administrative concerns would also be present in other UNE forbearance proceedings because of the statutory deadlines for deciding those forbearance petitions.

This does not mean that the Commission should completely ignore traditional market share measures—they just should not be the deciding factor in whether forbearance is warranted. In many areas in the country, competitive providers already serve half or more of mass-market lines, and there is no basis for continuing to subject incumbent providers to unbundling requirements in those areas. Where this is the case, traditional market share measures can provide dispositive evidence that unbundling requirements should be eliminated. The mere fact that competitive providers do not meet a specific market share threshold in a specific geographic area does not mean that forbearance from Section 251’s unbundling requirements should be denied. Therefore, although the Commission can use market shares as dispositive evidence that forbearance should be granted, it should continue to “consider[] *both* actual and potential competition” in deciding whether to grant forbearance from its UNE rules.<sup>133</sup>

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<sup>132</sup> *Triennial Review Order* ¶ 396.

<sup>133</sup> *Verizon*, 570 F.3d at 304. To the extent the D.C. Circuit’s reference in *Verizon* to the Commission “ensur[ing] competitors’ abilities to compete” is understood as a reference to the impairment standard — which considers competitors’ “ability” to compete without UNEs, 47 U.S.C. § 251(d)(2)(B) — the Commission has previously held correctly that § 251(d)(2) “requires [it] to ask whether requesting carriers are ‘impaired,’ not whether certain thresholds of retail competition have been met.” *TRO* ¶ 114 (quoting 47 U.S.C. § 251(d)(2)). The court’s reference to “competitors’ abilities to compete” could also be understood — so as not to contradict its holding at the outset of its opinion that the Commission had no obligation to “apply its § 251 impairment standard” in the context of a petition for forbearance from unbundling obligations, *Verizon*, 570 F.3d at 301 — as a gloss on Congress’s concern, in § 10(b), with “whether forbearance . . . will promote competitive market conditions,” 47 U.S.C. § 160(b). In that event, as explained above, the Commission has repeatedly and correctly refused to limit its analysis of those marketplace conditions to competitors’ actual success to date, as measured by market share.

For all of these reasons, although the D.C. Circuit in *Verizon* left open the possibility that the Commission could justify a market-share approach in the context of petitions like Qwest’s, this long line of Commission precedent, from a wide variety of contexts, as well as the DOJ’s reasoned economic analysis precludes the Commission from limiting its assessment of competitive marketplace conditions in a dynamic and rapidly changing marketplace to actual competition, as measured by an incumbent’s market share. This is true regardless of whether the Commission is directly applying the impairment standard or is applying the forbearance standard in the context of a petition seeking to eliminate UNE rules.<sup>134</sup>

#### **IV. The Commission Should Ensure That There is a Process for Eliminating Unnecessary Unbundling Requirements Using the Impairment Standard**

As demonstrated above, there is vigorous competition in the communications marketplace, with new and emerging competitors and technologies. Despite these significant competitive developments, the Commission has done virtually nothing to bring the unbundling requirements in its rules into line with current marketplace conditions, nor has it established a clear process—with straightforward standards and binding timelines—for obtaining relief from those requirements where competitors are not impaired. As a result, incumbents are still subject to unbundling requirements in most of the country. Indeed, with respect to DS0 UNEs, the only

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<sup>134</sup> *Verizon*, 570 F.3d at 303. To the extent the D.C. Circuit’s reference in *Verizon* to the Commission “ensur[ing] competitors’ abilities to compete” is understood as a reference to the impairment standard — which considers competitors’ “ability” to compete without UNEs, 47 U.S.C. § 251(d)(2)(B) — the Commission has previously held correctly that § 251(d)(2) “requires [it] to ask whether requesting carriers are ‘impaired,’ not whether certain thresholds of retail competition have been met.” *TRO* ¶ 114 (quoting 47 U.S.C. § 251(d)(2)). The court’s reference to “competitors’ abilities to compete” could also be understood — so as not to contradict its holding at the outset of its opinion that the Commission had no obligation to “apply its § 251 impairment standard” in the context of a petition for forbearance from unbundling obligations, *Verizon*, 570 F.3d at 301 — as a gloss on Congress’s concern, in § 10(b), with “whether forbearance . . . will promote competitive market conditions,” 47 U.S.C. § 160(b). In that event, as explained above, the Commission has repeatedly and correctly refused to limit its

areas where ILECs are no longer subject to UNE requirements are the handful of wire centers across the country where the Commission has granted forbearance: nine in Omaha, five in Anchorage, and one in the small town of Terry, Montana (population 544).<sup>135</sup>

Similarly, incumbents' DS-1 and DS-3 loop and transport unbundling requirements remain largely unchanged, despite the significant advances by intermodal competitors such as cable and fixed-wireless providers. For example, in 2007 and 2008, only a handful of additional Verizon wire centers met the Commission's triggers for eliminating DS-1 and DS-3 loop and transport unbundling.<sup>136</sup> That is not because competition to provide high-capacity services at those levels to business customers has stagnated — on the contrary, as shown above, that competition is even more robust today than ever. Instead, it is because competition has developed in ways not captured by the Commission's triggers, which exclude competitors, such as cable companies and fixed wireless providers, that serve customers “directly” and “wholly bypass[] incumbent LEC facilities.”<sup>137</sup>

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analysis of those marketplace conditions to competitors' actual success to date, as measured by market share.

<sup>135</sup> See *Omaha Forbearance Order* ¶ 59; Memorandum Opinion and Order, *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, 22 FCC Rcd 1958, ¶ 21 (2007) (“*Anchorage Order*”); Memorandum Opinion and Order, *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Resale, Unbundling and Other Incumbent Local Exchange Requirements Contained in Sections 251 and 271 of the Telecommunications Act of 1996 in the Terry, Montana Exchange*, 23 FCC Rcd 7257, ¶¶ 17-18 (2008); available at <http://www.city-data.com/city/Terry-Montana.html> (indicating that the population of Terry, Montana is 544).

<sup>136</sup> The data for 2007 and 2008 are the most current available data. During that period, no wire centers have met the Commission's criteria for DS-1 loops, only two have met the criteria for DS-3 loops, only two have been classified as “Tier 1” wire centers, and only six have been classified as “Tier 2” wire centers. See Verizon's Supplemental Wire Centers Exempt from UNE Hi-Cap Loop and Dedicated Transport Ordering, available at <http://www22.verizon.com/wholesale/attachments/supplemvzwirecentersexempt2008.xls> and <http://www22.verizon.com/wholesale/attachments/supplemvzwirecentersexempt2007.xls>

### **A. The Commission Has Repeatedly Acknowledged the Need to Establish a Process for Reviewing the Unbundling Mandates**

Section 251's unbundling requirements are intended to serve only as a temporary measure to facilitate competitors' entry into the market. Under Section 251(d)(2)(B), the Commission can require incumbent providers to unbundle network elements only when competitors are impaired in their "ability" to provide telephone service without unbundled access to those elements. Recognizing that Section 251's unbundling requirements were not intended to be permanent, the Commission has repeatedly acknowledged that it should review Section 251's unbundling mandates "*proactively*" so that "regulatory burdens are lifted *as soon as* competition eliminates the need for them."<sup>138</sup> In the *UNE Remand Order*,<sup>139</sup> the Commission decided to "revisit [its] unbundling rules in three years," to account for "changes in the market and new technologies."<sup>140</sup> The Commission explained that "[o]nly by periodically reevaluating the availability of alternative network elements outside the incumbent's network can we truly determine whether the incumbent's network should be unbundled in order to meet the requirements of section 251 and the goals of the Act."<sup>141</sup> The Commission, moreover, decided that a triennial review rulemaking was preferable to "[e]ntertaining, on an *ad hoc* basis, numerous petitions to remove elements from the list, either generally or in particular circumstances."<sup>142</sup> Having completed the triennial review process — in which it also responded to a vacatur of its second set of unbundling rules — the Commission decided not to "commit[ ]

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<sup>137</sup> *TRRO* ¶ 95 (internal quotation marks omitted).

<sup>138</sup> First Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1966*, 11 FCC Rcd 15499 ¶6 (1966) (emphases added).

<sup>139</sup> Third Report and Order and Fourth Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*") (subsequent history omitted).

<sup>140</sup> *Id.* ¶ 130.

<sup>141</sup> *Id.* ¶ 149.

<sup>142</sup> *Id.* ¶ 150.

to a further *de novo* triennial review” rulemaking.<sup>143</sup> Instead, the Commission decided to “rely on the biennial review mechanism established in section 11 of the Act,” as it “does with all of its other rules,” “to assess[] whether documented market changes merit modifications in [its unbundling] rules.”<sup>144</sup> However, since 2002, the Commission has not completed a biennial review under § 11 and, as a result, never eliminated an unbundling requirement through that process.

In the *Triennial Review Remand Order*, the Commission again recognized that it needed to update the unbundling rules it promulgated in that order, in particular to account for the increasing competitive significance of cable companies and wireless providers.<sup>145</sup> In deciding how best to update those rules, the Commission reversed its prior policy against individual carrier petitions to remove unbundling requirements. The Commission pointed favorably to Qwest’s then-pending petition “seek[ing] forbearance from the application of [the Commission’s] unbundling rules in” the Omaha MSA, and it “encourag[ed] other incumbent LECs to file similar petitions.”<sup>146</sup> The Commission thus decided not to “initiat[e] a number of separate proceedings to address, case-by-case, situations where the Commission’s impairment findings did not perfectly match local market realities,” but instead “invited incumbent LECs to seek forbearance from the application of the Commission’s unbundling rules.”<sup>147</sup> Despite inviting parties to seek relief from Section 251’s unbundling requirements through the

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<sup>143</sup> *TRO* ¶ 710.

<sup>144</sup> *Id.*

<sup>145</sup> See Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Local Exchange Carriers*, 20 FCC Rcd 2533 ¶ 36 (2005), *Petitions for Review Denied*, *Covad* 450 F.3d 528 (D.C. Cir. 2006) (subsequent history omitted).

<sup>146</sup> *Id.*

<sup>147</sup> Memorandum Opinion and Order, *Petition of ACS of Anchorage for Forbearance*, 22 FCC Rcd 1958 ¶ 5 (2006).

forbearance process, the Commission has not yet applied the impairment standard to UNE forbearance petitions.

**B. Applying the Impairment Standard to UNE Forbearance Petitions Would Create a Timely, Clear Process For Eliminating Unbundling Requirements**

Given the significant competitive developments in the marketplace in recent years, and consistent with the precedent discussed above, it is critical that the Commission establish some process for conforming its UNE rules to current marketplace conditions and also to the impairment standard. That process can be forbearance. As set forth above, the Commission can and should use the impairment standard in determining whether the forbearance criteria are met

But no matter which processes the Commission selects as its means to conform its unbundling rules to current marketplace evidence and the impairment standard—and, as the Commission has repeatedly acknowledged, it must have *some* such mechanism<sup>148</sup>—the Commission should use its decision in this proceeding to inform the industry of its preference, so that interested parties can pursue that mechanism without fear that they will learn at the end of that processes that they made the wrong procedural choice. The Commission should also ensure that the process it selects provides clear standards so that incumbents and competitors alike know what evidentiary showing is necessary to eliminate unbundling obligations, without concern that changing standards will result in a moving target for the incumbent to meet. The Commission should also ensure that any process includes clear, binding, and prompt timelines, analogous to those in the forbearance statute, so that unbundling obligations keep pace with the rapidly changing communications marketplace.

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<sup>148</sup> See, e.g., *Local Competition Order* ¶¶ 6, 246, 248; *UNE Remand Order* ¶¶ 130, 149; *TRO* ¶ 710; *TRRO* ¶ 39.

## CONCLUSION

For the foregoing reasons, the Commission should use an analytical framework that is consistent with Verizon's comments and should also designate a clear process for obtaining relief from UNE requirements that ensures that UNEs requirements are not maintained where competitors are not impaired.

Respectfully submitted,

Michael E. Glover  
*Of Counsel*

/s/ Rashann R. Duvall  
Edward Shakin  
Rashann R. Duvall  
**VERIZON**  
1320 N. Courthouse Rd.  
Arlington, VA 22201  
(703) 351-3179

*Attorneys for Verizon*

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